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No. 00-1316

IN THE
Supreme Court of the United States

FRANKLIN RODRIGUEZ DELGADO, *et. al.*,
Petitioners,

v.

SHELL OIL CO., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION BRIEF OF THE DOLE DEFENDANTS

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30 pp

QUESTIONS PRESENTED

1. Whether a corporation in which a foreign state indirectly owns a majority interest can qualify as an "agency or instrumentality" of that state under Section 4(b) of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(b), which treats any foreign corporation "a majority of whose shares or other ownership interest is owned by a foreign state" as an agency or instrumentality of a foreign state.

2. Whether this Court's decision in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), precludes removal prior to service of process, where that decision construed 28 U.S.C. § 1446(b), which requires removal within 30 days of receipt "through service *or otherwise*," and where the Court did not even address whether service was a prerequisite to removal.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The list of parties in the petition omits two third-party defendants in some of the suits consolidated in this case: Bromine Compounds, Ltd., and Amvac Chemical Company.

Respondent Dole Food Company, Inc., which has no parent corporations, has issued stock to the public, and no publicly-held company owns 10% or more of its stock. Respondents Dole Fresh Fruit Company, Standard Fruit Company, and Standard Fruit and Steamship Company are, either directly or indirectly, wholly-owned subsidiaries of Dole Food Company, Inc.

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Respondents Dole Food Company, Inc., Dole Fresh Fruit Company, Standard Fruit Company, and Standard Fruit and Steamship Company (collectively, the "Dole Defendants") respectfully submit this brief in opposition to the petition for writ of certiorari in this case.

INTRODUCTION

This case is one chapter in what has been aptly described as "one of the most wide-ranging efforts at forum shopping in legal history." *Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833, 837 (S.D. Fla. 1987), *aff'd in relevant part*, 883 F.2d 1553 (11th Cir. 1989). For nearly two decades, agricultural workers from Latin America, the Philippines, and other foreign countries have filed lawsuits in state courts across the United States claiming exposure in their home countries to a pesticide used on banana farms in the 1960s and 1970s. Because these cases lack any real connection with the United States, the result in every case to rule on the doctrine of *forum non conveniens* has been the same: the suits have been removed to federal court and dismissed based upon *forum non conveniens*.

The petition seeks to overturn a decision by the Fifth Circuit affirming another *forum non conveniens* dismissal. Petitioners do not—and cannot—challenge the application of the *forum non conveniens* doctrine below. Instead, they challenge the removal of their claims to federal court in the hopes that they can return to Texas, which for a brief period in the early 1990s did not recognize the *forum non conveniens* doctrine under a sharply divided—and now legislatively overruled—decision by the Texas Supreme Court.[1]

This case does not warrant review by this Court. Contrary to petitioners' suggestion, the interpretation of the Foreign Sovereign Immunities Act ("FSIA" or "Act"), 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11, in the decision

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[1] *See Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 675 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 71.051(a).

below does not conflict with the interpretation adopted by the Ninth Circuit. Indeed, the very issue raised by the petition is now being considered by the Ninth Circuit in *Patrickson v. Dole Food Co.*, Nos. 99-16524 & 99-16770. Similarly, the Fifth Circuit's application of the removal statute does not conflict with this Court's decision in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999). Finally, certiorari should be denied because, among other things, petitioners have settled their claims against most of the respondents and a remand would unnecessarily burden state courts and interfere with foreign ones.

COUNTERSTATEMENT

As petitioners' statement fails to place this case in proper context, detail the lengthy proceedings in this case, or fully describe the decision below, it is necessary to restate the case.

1. The pesticide about which petitioners complain, dibromochloropropane (DBCP), was developed by respondents Dow Chemical Company and Shell Oil Company in the 1950s and early 1960s to control nematodes, which are microscopic, worm-like creatures that live in soil and attack the roots of trees and plants. Growers both in and outside the United States, including banana growers, used DBCP to control nematodes and improve crop yields on banana farms from the late 1960s through the 1970s.

2. The first DBCP suit was brought in 1983 in a Florida state court by fifty-eight Costa Rican agricultural workers who sued Dow Chemical Company and Shell Oil Company. The suit was removed to federal court and dismissed based upon the *forum non conveniens* doctrine. *See Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1217 n.5 (11th Cir.) (per curiam), *cert. denied*, 474 U.S. 948 (1985). In affirming this dismissal, the Eleventh Circuit observed that the "suit present[ed] a paradigm for the invocation of the doctrine" of *forum non conveniens*. *Id.* at 1217-18.

Undaunted, foreign plaintiffs filed DBCP suits in other states. In 1984, several Costa Rican farmworkers sued Dow and Shell in Texas. *See Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 675 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991). In 1986, DBCP plaintiffs brought suit against Dow and Shell in California state court, where the case was removed to federal court and dismissed for *forum non conveniens*. *See Aguilar v. Dow Chem. Co.*, No. 86-4753, slip op. at 12-16 (C.D. Cal. Dec. 23, 1986). And in the 1990s, plaintiffs filed additional DBCP suits in Texas and Florida, as well as Hawaii, Louisiana, and Mississippi. Nearly all of these suits were upon removal either voluntarily dismissed or dismissed based upon the *forum non conveniens* doctrine.[2] Finding the continued

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[2] *See, e.g.*, *Cabalceta*, 883 F.2d at 1555-56; *Patrickson v. Dole Food Co.*, No. 97-10516, slip op. at 31-60 (D. Haw. Sept. 9, 1998), *appeal docketed*, Nos. 99-16524 & 99-16770 (9th Cir. July 7, 1999); *Espinola-E v. Coahoma Chem. Co.*, No. 96-360, slip op. at 5-9 (S.D. Miss. Mar. 30, 1998), *rev'd on other grounds*, *Espinola-E v. Coahoma Chem. Co.*, No. 98-60240, slip op. at 9 (5th Cir. Jan. 19, 2001) (approving application of *forum non conveniens* doctrine but remanding for consideration of jurisdictional amount) (petitions for rehearing pending); *Arroyo-Gonzales v. Coahoma Chem. Co.*, No. 96-358, slip op. at 2-7 (S.D. Miss. Dec. 31, 1997), *aff'd Espinola-E*, No. 98-60240, *supra*; *Belteton-Rivera v. Coahoma Chem. Co.*, No. 96-359, slip op. at 6-7 (S.D. Miss. Nov. 25, 1997), *aff'd*, *Espinola-E*, No. 98-60240, *supra*; *Garzon-Larreategui v. Coahoma Chem. Co.*, No 96-361, slip op. at 6-7 (S.D. Miss. Nov. 25, 1997), *aff'd*, *Espinola-E*, No. 98-60240, *supra*; *Valdez-C v. Coahoma Chem. Co.*, No. 96-362 slip op. at 43-46 (S.D. Miss. Nov. 25, 1997), *aff'd*, *Espinola-E*, No. 98-60240, *supra*; Notice, *Abarca-Abarca v. CNK Disposition Corp.*, No. 95-1096 (M.D. Fla. July 12, 1995) (voluntary dismissal); *Rojas v. DeMent*, 137 F.R.D. 30, 32-33 (S.D. Fla. 1991), *vacated on other grounds*, *Rojas v. DeMent*, No. 91-8185, slip op. at 3 (S.D. Fla. Feb. 25, 1992). Although a Louisiana district court remanded yet another DBCP case based upon lack of subject matter jurisdiction, *Martinez v. Dow Chem. Co.*, Nos. 95-3212 & 95-3214, 1996 U.S. Dist. LEXIS 13180, at *14-*15 (E.D. La. Sept. 4, 1996), that ruling was undermined by the decision below, and the defendants in that case have since removed again. *See* Notice of Removal, *Martinez v. Dow Chem.*

filing of DBCP suits to be an "'abuse' of the court system," judges in two of these cases issued injunctions prohibiting "the commencement of further suits in the United States" by the plaintiffs in those cases.[3] A similar injunction was issued in this case. 7 R. 8917.

3. This case has its roots in a suit filed in 1984 in Texas against Dow and Shell. After Dow and Shell unsuccessfully attempted to remove that suit to federal court, a Texas trial judge dismissed it based upon the *forum non conveniens* doctrine. *See Alfaro*, 786 S.W.2d at 675. In 1990, however, the Texas Supreme Court overturned the trial court's decision on the ground that a Texas statute had abolished the doctrine in suits involving certain foreign citizens. *See id.* at 677-78 (construing Tex. Civ. Prac. & Rem. Code Ann. § 71.031). The Texas legislature overturned this ruling in a 1993 statute. *See* Acts 1993, 73rd Leg., § 1 (codified at Tex. Civ. Prac. & Rem. Code Ann. § 71.051(a)). That statute does not, however, apply to actions commenced before September 1, 1993. *See id.* § 2.

Just prior to this deadline, in what the decision below described as a "classic exercise of forum shopping," Pet. App. 6, thousands of plaintiffs alleging injuries suffered in twenty-three different countries filed DBCP suits in Texas state courts before myriad different judges. Pet. App. 68-80. Petitioners brought these suits not only against Dow, Shell, and other manufacturers of DBCP, but also against growers such as Standard Fruit, Chiquita Brands, Inc., and Del Monte Tropical Fruit Company. Pet. App. 6.

Co., No. 00-3398 (E.D. La. Nov. 15, 2000).

[3] *Va' .ez-C*, No. 96-362, slip op. at 46; *see also Arroyo-Gonzales*, No. 96-358, slip op. at 7 (holding an injunction against "'abuse' of the court system" through commencement of further suits in the United States "warranted in this case").

Various defendants in these suits subsequently impleaded Dead Sea Bromine Company, Ltd., Bromine Compounds, Ltd., and Ameribrom, Inc. (collectively, "Dead Sea"). Pet. App. 7. During the relevant time period, Dead Sea was a supplier of DBCP, *see* Notice of Rebuttable Presumption against Registration and Continued Registration of Pesticide Products Containing Dibromochlropropane (DBCP), 42 Fed. Reg. 48,026, 48,028 (Sept. 22, 1977), and its products were implicated in each of the consolidated cases. Pet. App. 86-87 n.35. At the time those petitions were filed, the State of Israel controlled more than 65% of the stock in Dead Sea through its ownership of shares in Dead Sea's ultimate parent. Pet. App. 22. Claiming that it was majority owned by Israel and therefore an agency or instrumentality of a foreign state under the FSIA, Dead Sea removed the actions presently before this Court to various federal courts in Texas. Pet. App. 7.

4. The six suits presently before this Court were eventually consolidated in the Southern District of Texas. Pet. App. 8-14. On respondents' motion to dismiss under the *forum non conveniens* doctrine, the district court concluded that the balance of interests clearly weighed in favor of trial in petitioners' home countries. Pet. App. 119-65. Accordingly, the court dismissed the suits it found properly before it, subject to a period of discovery in the United States and other conditions designed to protect petitioners' ability to pursue their claims in their home countries. Pet. App. 165-67.

In so doing, the district court rejected petitioners' claim that these suits had been improperly removed by Dead Sea. It held that Dead Sea was an agency or instrumentality of the State of Israel under 28 U.S.C. § 1603(b)(2) because Israel controlled a majority of its stock at the relevant time. Pet. App. 46 & n.5. The court also found no basis for petitioners' claim that Dead Sea had been collusively joined because, among other things, respondents have valid contribution claims against Dead Sea. Pet. App. 84-87. The district court found, however, that four

of the suits before it had been prematurely removed before receipt of service of process and that this problem had been cured in only two of those suits. Pet. App. 91-95, 106-07. Accordingly, the district court remanded the two suits to state court. Pet. App. 164. Upon remand, defendants joined Dead Sea in an indisputably proper manner, and the two suits were again removed to the district court, which dismissed the cases based upon the *forum non conveniens* doctrine under the same conditions as previously. Pet. App 17-19.

Finally, as mentioned above, the district court enjoined petitioners from filing further DBCP actions in the United States. Pet. App. 171. In the court's view, this injunction was necessary because in its absence the judicial system would "suffer irreparable harm for which there is no adequate remedy at law from the refiling of DBCP-related lawsuits in this country." *Id.* A consolidated final judgment was entered on October 27, 1995. 7 R. 8917.

5. Petitioners' notice of appeal became effective on January 16, 1996, the date that the district court disposed of their motions to alter or amend the judgment. 4 R. 9775. Initial briefing was concluded by December 1996, and oral argument was heard in March 1997.

a. While the panel was considering the appeal, the parties engaged in mediation and settlement negotiations. In 1997, Dow, Shell, and the other manufacturer defendants entered into settlement agreements with most petitioners as well as other potential DBCP plaintiffs, and the Del Monte and Chiquita defendants later entered into similar agreements covering nearly all of the petitioners.[4] In exchange for release of the

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[4] *See* Agreed Motion of the Plaintiffs and the Chiquita and Del Monte Defendants for Voluntary Dismissal, *Delgado v. Shell Oil Co.*, No. 95-21074, at 2 (5th Cir. Feb. 29, 2000); Agreed Motion of the Plaintiffs and the Manufacturer Defendants for Voluntary Dismissal, *Delgado v. Shell Oil Co.*, No. 95-21074, at 2-3 (5th Cir. Feb. 22, 2000).

claims against them, the settling defendants promised in separate agreements to create a settlement fund, which the Dole defendants have been informed exceeds $40 million. *See, e.g.*, Compromise Settlement Agreement of The Dow Chemical Company ¶ 7 (Exhibit B to Dole Defendants' Opposition to Agreed Motion of Plaintiffs and the Manufacturer Defendants for Voluntary Dismissal, *Delgado v. Shell Oil Co.*, No. 95-21704 (5th Cir. Mar. 3, 2000)). Under these agreements, at least $100 goes to every petitioner and putative class member even in the absence of any evidence of diminished reproductive capability, and the rest of the settlement fund (less attorneys' fees of 40% to 50% paid before expenses) is divided up among the remaining petitioners and others covered by the agreement based upon sperm test results and number of children. *See, e.g., id.* ¶¶ 12-15, 19.

b. On October 19, 2000, nearly three and one-half years after oral argument, and more than five years after the final judgment below, the Fifth Circuit rendered its decision. Pet. App. 38-39. The court concluded that Dead Sea was an agency or instrumentality of a foreign state because the State of Israel owned a majority interest in it. Pet. App. 20-23. In so doing, the court held that "indirect or tiered majority ownership is sufficient to qualify an entity as a foreign state, assuming all other requirements are met." Pet. App. 23. The court "discern[ed] nothing to support [petitioners'] proposition that indirect ownership of the requisite percentage precludes an entity from qualifying as a foreign state." Pet. App. 22. To the contrary, it observed "[t]he plain language of the statute" "simply requires 'ownership' by a foreign state" and "draws no distinction between direct and indirect ownership . . . ." *Id.*

The Fifth Circuit also rejected petitioners' challenges to the joinder of Dead Sea. The court of appeals found no evidence that jurisdictional facts had been collusively manipulated or that Dead Sea had been in any way collusively joined. Pet. App. 28-36. It also found no merit in petitioners' objection that in

several cases Dead Sea had removed prematurely for the simple reason that "service of process is not an absolute prerequisite to removal." Pet. App. 25. Finally, the court rejected petitioners' suggestion that this Court's decision in *Murphy Brothers v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), holds otherwise on the ground that *Murphy Brothers* "did not address whether service was a prerequisite for a defendant to be able to remove a case." Pet. App. 25 n.23.

6. While the appeal below was pending, petitioners filed suits in their home countries as required by the district court's judgment. Consequently, since 1996, the Dole Defendants have been involved in suits in the Philippines, Ecuador, Honduras, Nicaragua, and Costa Rica. *See* Affidavit of Ann J. Durham ¶ 3 (annexed to Dole Defendants' Motion for Leave to File Affidavit, *Delgado v. Shell Oil Co.*, No. 95-21074 (5th Cir. Mar. 10, 2000)). Although actions in some of these countries have been dismissed—in large part because of petitioners' failure to pursue those claims in good faith (*see id.* ¶¶ 8, 10-13)—others have been proceeding on the merits in the Philippines, Ecuador, and Honduras. *See id.* ¶¶ 4-7. For example, in the Philippines, one court has issued more than half a dozen orders and two opinions dismissing certain defendants and resolving discovery-related disputes. *See id.* ¶ 5. In another case in the Philippines, the parties have engaged in extensive pleadings practice, and in Ecuador a court has affirmed that it has jurisdiction and venue over petitioners' claim. *See id.* ¶¶ 6-7.

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to review two questions, one concerning the treatment of indirect ownership under Section 4(b) of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(b), and the other concerning the need for service of process prior to removal. According to petitioners, these questions are worthy of this Court's attention because the

answers to them in the decision below conflict, respectively, with Ninth Circuit law and with this Court's recent decision in *Murphy Brothers v. Michette Pipe Stringing, Inc.*, 526 U.S. 344 (1999). That is incorrect. As the pending appeal before the Ninth Circuit in the *Patrickson* case demonstrates, there is currently no conflict between the decision below and Ninth Circuit law. Nor is there any conflict with *Murphy Brothers* because in that case this Court neither faced nor considered any issue decided below. Finally, both practical and policy considerations weigh against granting certiorari and prolonging this already protracted case even further, especially in light of the huge settlement petitioners have already secured with most of the respondents.

I. THE FIFTH CIRCUIT'S APPLICATION OF THE FSIA DOES NOT WARRANT THIS COURT'S REVIEW.

Petitioners contend that the decision below is an important one warranting this Court's attention because the interpretation of the FSIA below conflicts with the Ninth Circuit's interpretation in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir.), *cert. denied*, 516 U.S. 869 (1995). Pet. at 10-14. In fact, however, there is no conflict between the decision below and *Gates*. In addition, considerations of sound judicial administration and international comity support denial of certiorari in this case.

A. The Decision Below Does Not Implicate Any Conflict Among the Circuits or Otherwise Warrant this Court's Attention.

There is no conflict among the circuits over whether indirect ownership interests can satisfy Section 4(b) of the FSIA. The decision below's position on this issue is consistent with the treatment several courts of appeals, including the Ninth Circuit, have afforded corporations indirectly owned by foreign states. *See, e.g., In re Air Crash Disaster Near Roselawn, Indiana*, 96

F.3d 932, 941 (7th Cir. 1996); *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 109 (6th Cir. 1995); *Straub v. A.P. Green, Inc.*, 38 F.3 448, 451 (9th Cir. 1994); *Teledyne, Inc. v. Kone* Corp., 892 F.2d 1404, 1406-07, 1411-12 (9th Cir. 1989); *America W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 795-96 (9th Cir. 1989). Even more importantly, that decision does not conflict with the Ninth Circuit's decision in *Gates* for the simple reason that *Gates* neither faced nor addressed the issue of indirect ownership interests.

1. Section 4 of the FSIA, 28 U.S.C. § 1603, defines several key terms used in the Act. For example, Section 4(a) states that the term "'foreign state' . . . includes a political subdivision or an agency or instrumentality of a foreign state as defined in subjection (b)." 28 U.S.C. § 1603(a). In addition, Section 4(b) defines an "agency or instrumentality of a foreign state" to mean any entity

> (1) which is a separate legal person, corporate, or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or *a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof*, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

Id. § 1603(b) (emphasis added).

2. In *Gates*, the Ninth Circuit did not consider whether a state's indirect interest in the subsidiaries of companies it owns constitutes an "other ownership interest" under Section 4(b)(2) of the Act, the question addressed below. Instead, it considered what constitutes a foreign state for purposes of that provision.

a. In *Gates*, former employees of a California pork processing plant sued their employer, their employer's parent Fletcher's Fine Foods ("FFF"), and FFF's parent the Alberta Pork Producers Development Corporation ("Alberta Pork Producers"), in connection with the closing of the plant. *See* 54 F.3d at 1459. Alberta Pork Producers is a marketing board organized by Alberta hog producers, which under Canadian law acts as the sole marketing agent for hogs raised in the province. *See id.* at 1459-60.[5] FFF is a pork processing company that Alberta Pork Producers purchased. *See id.* at 1459.

Due to the extensive government control exercised over the board, the Ninth Circuit held that Alberta Pork Producers was an organ of the Province of Alberta and therefore an agency or instrumentality of the state of Canada under the FSIA. *See Gates*, 54 F.3d at 1460-61. The court of appeals also considered whether FFF was an agency or instrumentality due to Alberta Pork Producers' ownership of the company. *See id.* at 1461-62. Since Alberta Pork Producers owned 100% of FFF, it was clear that Alberta Pork directly owned a majority interest in the company. As a consequence, the question with respect to FFF was whether this mattered, that is, whether Alberta Pork Producers, as an agency or instrumentality of Canada, could be considered a foreign state under Section 4(b)(2) of the FSIA in determining whether FFF was in turn an agency or instrumentality as well. *See id.*

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[5] At several points, the petition suggests that Alberta Pork Producers was owned by the Canadian government. *See* Pet. at 14 ("Defendants included several entities ultimately owned by a Canadian government body."); *id.* at 15 (describing the issue in *Gates* raised by FFF as "whether the entity claiming immunity could be indirectly owned by the foreign state"). That is incorrect. *Gates* makes it clear that Alberta Pork Producers was owned by hog producers, not the Canadian government. *See* 54 F.3d at 1460-61.

Gates held that Alberta Pork Producers' ownership interest did not matter. Although Section 4(a) of the Act defines "foreign state" to include agencies or instrumentalities under Section 4(b)(2), the Ninth Circuit concluded that the former section's definition of foreign states cannot be used in identifying agencies or instrumentalities under the latter. *See Gates*, 54 F.3d at 1462. Noting that both Section 4(a) and Section 4(b)(2) refer to "'political subdivision[s],'" *Gates* reasoned that Congress did not intend Section 4(a)'s definition of foreign states, which incorporates political subdivisions, to be used in identifying agencies or instrumentalities under Section 4(b). *See Gates*, 54 F.3 at 1462. In addition, the Ninth Circuit suggested that using the definition of foreign state in Section 4(a) would greatly expand the scope of immunity the FSIA affords by "provid[ing] potential immunity for every subsidiary in a corporate chain, . . . so long as the first corporation is an organ of the foreign state or political subdivision or has a majority of its shares owned by the foreign state or political subdivision." *Id.*

b. *Gates* is easily distinguishable from the decision below. In that decision, the Fifth Circuit did not consider whether a parent corporation that qualifies as an agency or instrumentality of a foreign state can be deemed a foreign state in determining whether its subsidiary is an agency or instrumentality. To the contrary, implicitly assuming that Dead Sea's corporate parents could not be treated as foreign states, the Fifth Circuit examined the ownership interest of the State of Israel itself and determined that that interest, though indirect, was sufficient to satisfy the majority-ownership requirement of Section 4(b). In other words, while *Gates* examined what can be treated as a foreign state under Section 4(b), the decision below considered what constitutes an ownership interest under that provision.

c. The plaintiffs in *Gates* recognized this distinction in opposing the petition for certiorari in that case. When FFF

petitioned this Court to review the Ninth Circuit's decision in *Gates*, it asserted that *Gates* conflicted with decisions from other circuits treating indirectly-owned subsidiaries as agents or instrumentalities of foreign states. *See* Petition for Writ of Certiorari, *Fletcher Fine Foods, Ltd. v. Gates*, No. 95-175, at 9-10 (U.S. July 31, 1995). In response, the plaintiffs in *Gates* pointed out that the question of what constitutes ownership was not implicated by the Ninth Circuit's decision because "[u]nlike the defendants seeking immunity in the above cases, petitioner herein [FFF] is not owned either directly *or indirectly* by the federal government of Canada, the provincial government of Alberta, or by any political subdivision of either of those governments." Resp. Opp. to Petition for Writ of Certiorari, *Fletcher Fine Foods, Ltd. v. Gates*, No. 95-175, at 13 (U.S. Aug. 30, 1995) (emphasis added).

d. The Ninth Circuit has also recognized, albeit implicitly, the distinction between the issue addressed in *Gates* and the one addressed below. Although prior to *Gates* the Ninth Circuit treated subsidiaries indirectly-owned by foreign states as agencies or instrumentalities under Section 4(b), *see Straub*, 38 F.3d at 451; *Teledyne, Inc.*, 892 F.2d at 1406-07, 1411; *America W. Airlines*, 877 F.2d at 795-96, notably absent from *Gates* itself is any mention of these decisions. If, however, *Gates* had intended to prohibit indirectly-owned subsidiaries from being considered agencies or instrumentalities under the Act, it would almost certainly have discussed those decisions.

Nor does the Ninth Circuit's decision in *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650 (9th Cir. 1996), demonstrate otherwise. According to petitioners, *Corporacion Mexicana* adhered to *Gates*' ruling that a company does not qualify as an agency or instrumentality of a foreign state merely because it is wholly-owned by an agency or instrumentality of a foreign state. Pet. at 14. While that is certainly correct, *see Corporacion Mexicana*, 89 F.3d at 655, this fact does not help petitioners

because, as pointed out above, this case presents the distinct question whether a foreign state's indirect ownership can constitute a majority "ownership interest" under Section 4(b)(2) of the FSIA. Moreover, any statements in *Corporacion Mexicana* on this question would have been dictum because the Ninth Circuit found that the subsidiary in that case was an organ of the Mexican government. *See id.*

In all events, the Ninth Circuit's position on these issues will likely be clarified by the Ninth Circuit's pending decision in *Patrickson v. Dole Foods Co.*, the DBCP action filed in Hawaii. As the petition points out, that case involves basically the same defendants and claims as here and raises the same question concerning indirect ownership interests raised here. *See* Pet. at 24 n.8. What petitioners fail to inform this Court is that this question is now pending before the Ninth Circuit.[6] Although the district court in *Patrickson* recognized that *Gates* was not entirely on point because it turned on "whether a subsidiary of an organ of a foreign state is a foreign state" for purposes of Section 4(b), Pet. App. 189, 191, it nonetheless held that indirect ownership does not satisfy the requirements of Section 4(b)(2) based upon "guidance" from *Gates*. Pet. App. 191-95. On appeal, respondents here argued that *Gates* is distinguishable because "the majority ownership prong of § 1603(b)(2) was not in issue" in *Gates* and the Ninth Circuit therefore "never considered whether indirect majority ownership is sufficient under the ownership prong of § 1603(b)(2)." Brief for Third-Party Defendants-Appellees/Cross-Appellants Dead Sea Bromine Co., Ltd. and Bromine Compounds Limited, *Patrickson v. Dole Foods Co.*,

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[6] This omission is inexplicable given that some of the same plaintiffs' lawyers are involved both in this case and in *Patrickson*. *Compare Delgado v. Shell Co.*, 890 F. Supp. 1324, 1333 (S.D. Tex. 1995) (listing counsel) *with* Brief of Plaintiffs-Appellants/Cross-Appellees, *Patrickson v. Dole Food Co.*, Nos. 99-16524 & 99-16770, at 54 (9th Cir. Oct. 15, 1999) (same).

Nos. 99-16524 & 99-16770, at 40-43 (9th Cir. Jan. 3, 2000). Thus, it would be premature to address any supposed conflict between the decisions below and *Gates* before *Patrickson* either resolves or clarifies that conflict.

3. Petitioners claim that the decision below conflicts with the opinion of one judge from the Third Circuit and with several district court opinions. Pet. at 18-22. Petitioners do not, however, even begin to explain why such conflicts, which may work themselves out as the courts of appeals address the question of indirect ownership, warrant this Court's attention. Moreover, contrary to petitioners' suggestion, *see* Pet. at 18-19, Judge Greenberg did not endorse their interpretation in *Federal Insurance Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270 (3d Cir. 1993), *cert. denied*, 511 U.S. 1107 (1994). Instead, he merely indicated that "a reasonable inference might be drawn that the term 'foreign state' in 28 U.S.C. § 1603(b)(2) does not include an entity which is a foreign state only because it is an agency or instrumentality of a foreign state." *Federal Ins. Co.*, 12 F.3d at 1285 n.12. In other words, like the Ninth Circuit in *Gates*, Judge Greenberg dealt with the question of what qualifies as a foreign state, not what constitutes majority ownership. Furthermore, it is important to note that he was not joined in this observation by the other two members of the panel in that case. Thus, Judge Greenberg's observations offer the petition no support.[7]

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[7] The decision below does not offer any support either. Petitioners assert that the decision acknowledged a "conflict with the Ninth Circuit's holding" in *Gates*. Pet. at 13. In fact, the Fifth Circuit merely included a "*but see*" citation to *Gates* without any analysis or explanation. Pet. App. 23. This fleeting reference hardly acknowledges a conflict with the holding in *Gates*. In any event, as noted above, the question of how the Ninth Circuit treats indirect ownership under the FSIA is presently pending before that court.

B. The Decision Below Correctly Interprets the FSIA.

Although the petition asks this Court to review the Fifth Circuit's interpretation of the FSIA in the decision below, notably absent from the petition is any attempt to demonstrate that the interpretation is erroneous. This omission is not surprising: as the decision below demonstrated, its interpretation follows from the plain language of the statute.

Under Section 4(b) of the Act, any alien corporation "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof" constitutes an agency or instrumentality of that state. 28 U.S.C. § 1603(b)(2); *see also id.* § 1603(b)(1) (requiring that the entity in question be a "separate legal person, corporate, or otherwise"). As the Fifth Circuit recognized, this definition "draws no distinction between direct and indirect ownership"; instead, it "simply requires 'ownership' by a foreign state." Pet. App. 22. In fact, Section 4(b) clearly indicates that direct ownership is *not* required by providing for ownership either of shares—that is, direct ownership—or "other ownership interest"—which plainly can be indirect in nature. Thus, the text of Section 4(b) establishes that a foreign corporation may qualify as an agency or instrumentality of a foreign state based upon indirect ownership by that state.

In addition to reflecting the plain language of the FSIA, this interpretation makes good, practical sense. Like private investors, foreign countries often set up holding companies that operate through wholly-owned subsidiaries. If the holding company is itself wholly-owned, a foreign government structuring its interests in this way will exercise more effective control over the holding company's operating subsidiary than it would over a third corporation in which it owns 51% of the shares itself. Under petitioners' interpretation, however, the third corporation would qualify as an agency or instrumentality under the FSIA because the foreign state's ownership interest is direct, while the wholly-owned operating subsidiary would

not because the state's interest in the subsidiary, though total, is indirect. This interpretation exalts form over substance. Since petitioners do not—and cannot—point to any concern that this country has in dictating the form in which foreign countries own corporations, that interpretation must be rejected.

Moreover, unlike the recursive interpretation of Sections 4(a) and 4(b) rejected in *Gates*, *see supra* pp. 11-12, the interpretation below would not "provide potential immunity for every subsidiary in a corporation, no matter how far down the line." *Gates*, 54 F.3d at 1462. Under the latter interpretation, the subsidiary of a corporation majority-owned by a foreign state would not automatically qualify as an agency or instrumentality of that state. To the contrary, under that interpretation, if a state owns 51% of the shares in a parent corporation, which in turn owns 51% of the shares in a subsidiary corporation, the subsidiary will not qualify as majority owned because the state's ownership interest would be only 25.5% (=.51 x .51). Indeed, even if the foreign state owns 70% of the stock in a corporation which in turn owns 70% of the stock of a subsidiary, the subsidiary will not be considered an agency or instrumentality of the state under this interpretation because the foreign state's ownership interest in the subsidiary would only be 49% (=.70 x .70). Thus, under the Fifth Circuit's interpretation, a subsidiary of a corporation owned by a foreign state will only qualify as an agency or instrumentality of that state if the state owns a true majority interest.

C. Review Should Be Denied for Practical and Policy Reasons as Well.

In all events, this Court should not grant certiorari in this case because any tension between the decision below and the Ninth Circuit may be resolved by the pending decision in the *Patrickson* case and because prolonging this case would unnecessarily burden state courts and interfere with foreign

ones.

1. It would be premature and potentially wasteful to review the Fifth Circuit's interpretation of the FSIA while the Ninth Circuit is considering the very same issue in *Patrickson* for the simple reason that the decision in *Patrickson* may clarify whether there is any conflict between Ninth Circuit law and the decision below. If the Ninth Circuit agrees with the Fifth Circuit's reading of the Act, there will be no conflict and therefore no possible reason to review the FSIA question. If, however, the Ninth Circuit disagrees, it will presumably explain why and thereby make the basis of any potential conflict clear. Thus, no matter how the Ninth Circuit rules in *Patrickson*, it would be imprudent to review the question presented in this case.

2. In addition, this Court should not prolong the already protracted proceedings in this case. The district court entered a final consolidated judgment in December 1995, more than five years ago, and the Fifth Circuit took more than three and one-half years after oral argument to issue a decision. Especially since the decision below was correct, the Dole Defendants should not be forced to endure further delay in the final resolution of this case.

3. Certiorari should also be denied in this case because any remand would unnecessarily burden the Texas state courts. The consolidated claims in this suit involve thousands of plaintiffs (and an uncertified class of many thousands more) in nearly two dozen countries. Moreover, those claims are based upon exposure to a chemical that the Dole Defendants have not employed for more than twenty years. Litigation of these increasingly stale claims in the United States would be a lengthy, drawn out affair that would unnecessarily consume scarce judicial resources.

Furthermore, the Texas state courts do not have any real interest in entertaining these claims. As detailed earlier, nearly

every court to apply the doctrine of *forum non conveniens* has determined that the DBCP claims of foreign agricultural workers such as petitioners belong in their home countries, not in the United States. *See supra* p. 3 & n.2. While the Texas Supreme Court found in the *Alfaro* case that the *forum non conveniens* doctrine had been abrogated in cases involving certain foreign citizens, that decision was quickly overruled by the Texas state legislature. *See supra* p. 4. Thus, a remand in this case would serve little purpose beyond rewarding petitioners for filing their claims in Texas in the short period between the ruling in *Alfaro* and the effective date of the legislation overruling it.

Petitioners have, however, already received more than ample reward for their forum shopping. While the Fifth Circuit was considering their appeal, petitioners were able to negotiate a settlement against all of the defendants except the Dole Defendants creating a settlement fund that exceeds $40 million. *See supra* pp. 6-7. As petitioners are still able to pursue their claims against the Dole Defendants in their home countries, or return to the district court if they legitimately cannot do so, there is no need for this Court to help petitioners capitalize even further on their forum shopping.

4. Finally, were this Court to remand this case to state court, it would effectively unwind foreign suits that have been proceeding for years. Since the suits currently before this Court were dismissed, suits have been proceeding in Ecuador, Honduras, and the Philippines. Principles of international comity and, in particular, respect for the efforts invested by foreign courts into petitioners' claims, weigh strongly against taking any action at this late date that could result in a remand to Texas state courts because such a remand would moot all of the work those foreign courts have done. *See, e.g., Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1223-24 (11th Cir. 1999) (noting that American courts should apply a "proper level of respect" for foreign courts and consider, among other things,

the "efficient use of judicial resources" in determining whether to abstain in favor of suits pending in foreign courts) (quotations omitted). Thus, for this reason as well, this Court should decline petitioners' request to review the decision below's interpretation of the FSIA.

II. THE REMOVAL QUESTION DOES NOT WARRANT THIS COURT'S REVIEW.

In addition to seeking review of the Fifth Circuit's application of the FSIA, petitioners also seek review of the Fifth Circuit's determination that a case may be removed prior to service of process. Pet. at 24-29. In so doing, however, petitioners do not contend that there is any conflict among the circuits over this ruling or even that this question is an important one. Instead, petitioners ask this Court to review the ruling on the ground that it conflicts with this Court's decision in *Murphy Brothers Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999). Pet. at 24-29. This request has no merit.

1. The decision below does not conflict with *Murphy Brothers* because *Murphy Brothers* dealt with the deadline for removal, not its prerequisites. In that case, the plaintiff faxed a courtesy copy of the complaint to the defendant after filing their complaint and then formally served the defendant several weeks later after settlement negotiations proved unsuccessful. *See* 526 U.S. at 346. When the defendant sought to remove thirty days after service, the plaintiff claimed that the removal was untimely because the fax had been received more than thirty days before. *See id.* at 347; *see also* 28 U.S.C. § 1446(b) (requiring removal within thirty days of receipt, "through service or otherwise," of the complaint). This Court disagreed based in large part upon the absence of any evidence that Congress intended to depart from the traditional rule that "[i]n the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant." *Murphy Bros.*, 526 U.S. at 350; *see id.* at 350-56.

As the Fifth Circuit recognized, *Murphy Brothers* does not conflict with the decision below for the simple and obvious reason that the former "did not address whether service was a prerequisite for a defendant to be able to remove a case." Pet. at 25 n.23. As this Court clearly stated, the question before it in *Murphy Brothers* concerned "whether the named defendant must be officially summoned to appear in the action before the time to remove begins to run," not whether a case may be removed prior to service of process. *Murphy Bros.*, 526 U.S. at 347. Accordingly, both of the other courts to consider whether *Murphy Brothers* requires service of process prior to removal have agreed that it does not. *See Doney v. CMI Corp.*, No. 99-1124, 2000 WL 554125, at *2 (W.D. Mo. May 4, 2000) (rejecting suggestion that *Murphy Brothers* prohibits removal before service has been completed); *Ward v. Aetna Life Ins. Co.*, No. 98-CV-0542E, 1999 WL 222559, at 1 n.1 (W.D.N.Y. April 12, 1999) (noting that a defect in service "does not help the plaintiff [in contesting removal] under the reasoning in *Murphy Brothers*").

Noting this Court's statement that "one becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority asserting measure," *Murphy Bros.*, 526 U.S. at 350, petitioners argue that an entity cannot remove until it has been served because it is not a party until that point. Pet. at 26-27. Petitioners do not, however, point to any passage in *Murphy Brothers* supporting this conclusion. To the contrary, *Murphy Brothers* explicitly recognizes that a court may exercise power over a defendant by either service of process or "waiver of service by the defendant." *Murphy Bros.*, 526 U.S. at 350; *see also id.* ("*Unless a named defendant agrees to waive service*, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights.") (emphasis added). Thus, petitioners' claim that there is a conflict between the decision below and *Murphy Brothers* is meritless.

2. Petitioners do not even begin to show that the removal question posed by this case warrants this Court's attention. As noted above, there is no conflict among the lower courts over this question. Moreover, petitioners do not even attempt to establish the importance of this issue.

3. The decision below correctly decided the removal question. First, as the Fifth Circuit observed, the FSIA's removal provision "does not refer to a served party, or even the term 'party,' and it does not differentiate between parties who have been served and those who have not." Pet. App. 26. As a consequence, the prerequisite of service that petitioners would impose conflicts with the plain language of the controlling statute. Second, as this Court recognized in *Murphy Brothers* itself, service of process can be waived. *See Murphy Bros.*, 526 U.S. at 350-51; *see also* Fed. R. Civ. P. 4(d) (providing for waiver of service of process). Third, as the court of appeals found, because an action is commenced under Texas procedure when a petition is filed, service was not needed under Texas procedure to commence the claims against Dead Sea. Pet. at 26-27.

4. This case is not a good vehicle in which to consider whether service is required prior to removal because, as just noted, in this case that question turns in part upon disputed issues of Texas procedure and because this question does not affect all of the suits consolidated in this case. Pet. at 10. In addition, because it is possible that any defect in service could again be cured on remand, the only effect that consideration of the removal question may have is to further delay the proceedings in petitioners' home countries. Pet. App. 9, 13, 17-19. Finally, many of the same policy considerations that weigh against considering the FSIA question—the already protracted nature of this case, the burden on state courts, the potential unwinding of long-standing proceedings in foreign courts, and the petitioners' settlements with most of the defendants (*see supra* pp. 17-20)—also weigh against

consideration of the removal question. Petitioners' request for review of the removal question should be denied.

CONCLUSION

For the reasons stated above, the Dole Defendants respectfully request that the petition be denied.

Respectfully submitted,

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